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No. 89-690

In the Supreme Court of the United States

OCTOBER TERM, 1989

LEO HURWITZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Central Intelligence Agency (CIA) opened and read a letter petitioner mailed from New York City to the Soviet Union in 1963. Petitioner filed suit against the United States in May 1988 under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for damages based on an alleged invasion of privacy that occurred when the CIA opened his letter. The question presented is whether the court of appeals correctly upheld dismissal of petitioner's suit on the ground that New York does not recognize a common law action for invasion of privacy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 884 F.2d 684. The orders of the district court (Pet. App. A17-A20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1989. The petition for a writ of certiorari was filed on October 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 27, 1963, petitioner mailed a letter from New York City to a person in the Soviet Union. Without his knowledge, the letter was opened and copied by the Central Intelligence Agency as part of a program in which agents intercepted and opened mail sent to certain communist countries. Although the mail-intercept program was revealed to the public during the mid-1970s in the course of the investigations by the "Rockefeller Commission" and congressional committees,[1] petitioner alleges that he did not learn that his letter had been intercepted until he received a response from the CIA in August of 1987 to an unrelated "request for file" made pursuant to the Privacy Act of 1974, 5 U.S.C. 552a. Pet. App. A4-A5.

In September 1987, petitioner filed a claim with the CIA. The claim was denied by letter of March 9, 1988, and on May 13, 1988, petitioner sued the United States under the Federal Tort Claims Act (FTCA) in the Eastern District of New York, alleging that the opening and copying of the letter was an invasion of privacy. Pet. App. A5-A6.

On October 7, 1988, the district court dismissed the complaint and granted summary judgment to the United States on the ground that the action was barred by the statute of limitations. Pet. App. A17-A20. The court held that, as of 1975, petitioner had at least constructive knowledge of interference with the mails that triggered the running of the statute

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[1] See *Report to the President by the Commission on CIA Activities within the United States* (1975); see also *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 755, 94th Cong., 2d Sess. Bk. III, at 561-636 (1976).

of limitations. Since the applicable two-year limitations period expired in 1977, petitioner's suit was untimely. See Pet. App. A8.

Petitioner appealed, and the Second Circuit affirmed. The court first noted that since the FTCA is a waiver of sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)), petitioner was required to establish that New York law would recognize a cause of action in tort for the unauthorized opening of the mail of another. Pet. App. A9. The court then observed that in *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), a case presenting "the same fact pattern" (Pet. App. A3) as petitioner's, it had concluded that New York would likely recognize a "right to be free from an unreasonable intrusion" action. 558 F.2d at 326. See Pet. App. A3. But the court was convinced by the uniform intervening New York decisional law that its *Birnbaum* surmise had been wrong. The court was "compelled to conclude that New York's highest court has not recognized a cause of action for intrusion upon the privacy of another." Pet. App. 12.

Because New York law would not recognize petitioner's cause of action, the court of appeals held that petitioner's claim was not cognizable under the FTCA. Pet. App. A16. Accordingly, the court affirmed the judgment dismissing the complaint without reaching the statute of limitations issue decided by the district court.[2]

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[2] In the *Birnbaum* case, which was decided in 1978, the Second Circuit had held that "the Statute of Limitations has run by now on all unfiled mail opening claims for relief." 588 F.2d at 335 n.31.

ARGUMENT

The court of appeals' decision, which turns solely on a question of state law, raises no issue of national significance. The decision is correct, and further review is not warranted.

1. In *Birnbaum* v. *United States*, *supra*, the Second Circuit predicted that New York would recognize a cause of action for invasion of privacy for the unauthorized opening of mail. Since then, twenty years of decisions by the New York courts have convinced the court of appeals that its assessment was wrong.

Birnbaum involved consolidated suits under the FTCA by individuals whose mail had been opened and copied under the same CIA intercept program that led to the opening of petitioner's letter. The *Birnbaum* court noted that the leading State case, *Roberson* v. *Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), had rejected the contention that New York law recognized a right of action for invasion of privacy. Despite this precedent, the court of appeals reasoned that since *Roberson*, the widening acceptance of tort actions for violations of privacy rights made it "hard to believe that the New York Court of Appeals today would apply the rationale of the 1902 *Roberson* decision to bar an action based on intrusion upon privacy." 588 F.2d at 325. The court stated that its "assessment of current legal thinking" warranted the judgment that New York "would recognize an action for violation of the right to be free from unreasonable intrusion" (*id.* at 326), and that the *Birnbaum* plaintiffs therefore had stated a claim under the FTCA.

2. As the court below observed, "[t]ime has proved that judgment wrong. New York's highest

court has consistently reminded litigants that no so-called common law right of privacy exists in New York." Pet. App. A3. An unbroken line of precedent supports this observation. See *Freihofer* v. *Hearst Corp.*, 65 N.Y.2d 135, 140, 480 N.E.2d 349, 353, 490 N.Y.S.2d 735, 739 (1985); *Arrington* v. *New York Times Co.*, 55 N.Y.2d 433, 440, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982), cert. denied, 459 U.S. 1146 (1983); *Cohen* v. *Hallmark Cards, Inc.*, 45 N.Y.2d 493, 497 n.2, 382 N.E.2d 1145, 1146 n.2, 410 N.Y.S.2d 282, 284 n.2 (1978); *Flores* v. *Mosler Safe Co.*, 7 N.Y.2d 276, 280, 164 N.E.2d 853, 854, 196 N.Y.S.2d 975, 977 (1959).

Because "the State's highest court is the best authority on its own law" (*Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967)), and that court has repeatedly rejected the theory on which petitioner's case rests, the court of appeals properly concluded that petitioner has no claim under the FTCA for the government's purported invasion of his privacy.[3]

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[3] In the "Questions Presented" portion of the petition, it is suggested that the government may be liable "for the deprivation of plaintiff's right to the secrecy and security of his first-class mail under 42 U.S.C.A. § 1983." But that provision applies only to actions taken under color of the law of "any State or Territory or the District of Columbia," and thus has no application to the facts of this case. Insofar as petitioner may be claiming a right of action directly under the Constitution analogous to that recognized in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), he did not raise that issue in the court below. As he asserted in his brief in the court of appeals, "[petitioner] commenced this action under the Federal Tort Claims Act." C.A. Br. 2. Moreover, petitioner has named no individual defendants in this action.

Additionally, petitioner argues (Pet. 6-7) that a tort action may be predicated on Section 250.25 of the New York Penal

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Code (McKinney 1989), which makes it a crime to open, read, or divulge the contents of a sealed letter without the sender's or recipient's permission. This argument too was not raised in or addressed by the court of appeals. Moreover, as the court of appeals noted, the "only available remedy" for invasion of privacy in New York is found in Civil Rights Law Sections 50 and 51 (McKinney 1976 & Supp. 1990). Pet. App. A14 (quoting *Freihofer*, 65 N.Y.2d at 140, 480 N.E.2d at 349, 490 N.Y.S.2d at 735). These provisions protect only against unauthorized commercial exploitation of one's name or photograph and thus do not protect against the invasion of privacy alleged here. The single case cited by petitioner in support of his argument, *34 Hillside Realty Corp.* v. *Norton*, 198 Misc. 302, 101 N.Y.S.2d 437 (N.Y. City Ct. 1950) (discussed at Pet. 8-9), is not a privacy case; it involved the implication of a private right of action by a landlord against a tenant for violating a penal statute prohibiting bribery to obtain a rental apartment.

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